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No. 80-1900

IN THE

SUPREME COURT
OF THE UNITED STATES

October Term 1980

EULA MAE DENARD,

Petitioner,

v

MICHIGAN NATIONAL BANK,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
QUESTIONS PRESENTED FOR REVIEW	iv
COUNTERSTATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	6
ARGUMENT	
I. THE COURT OF APPEALS WAS CORRECT IN AFFIRMING THE DISTRICT COURT'S GRANTING OF SUMMARY JUDGMENT WHERE THE UNDISPUTED FACTS SHOW THAT PETITIONER WAS DENIED CREDIT SOLELY BECAUSE SHE HAD AN OUTSTANDING JUDGMENT AGAINST HER PERSONALLY	7
II. PETITIONER DOES NOT HAVE STANDING TO CHALLENGE RESPONDENT'S CREDIT POLICIES BECAUSE SHE WAS NOT A VICTIM OF ANY DISCRIMINATION BASED ON SEX OR MARITAL STATUS, BUT RATHER SHE WAS DENIED CREDIT DUE SOLELY TO AN OUTSTANDING JUDGMENT AGAINST HER PERSONALLY	10
III. THIS CASE SHOULD NOT BE CERTIFIED AS A CLASS ACTION BECAUSE PETITIONER IS NOT A MEMBER OF THE CLASS SHE SEEKS TO REPRESENT AND BECAUSE HER NUMEROUS LATE FILINGS SHOW THAT SHE WOULD NOT MAKE AN ADEQUATE CLASS REPRESENTATIVE	15
CONCLUSION	19

TABLE OF AUTHORITIES

Case **Page**

Armour v City of Anniston
597 F2d 46 (5th Cir, 1979) 16

Brown v Milwaukee Spring Co.
82 FRD 103 (ED Wis, 1979) 17

City Finance Co. v Kloonstra
47 Mich App 276, 209 NW2d 498 (1973) 4

Crawford v Western Electric Co.
614 F2d 1300 (5th Cir, 1980) 15

Equal Employment Opportunity Commission v Carter Carburetor
76 FRD 143, 144 (ED Mo, 1979) 14

Gladstone Realtors v Village of Bellwood
441 US 91, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979) .. 10, 11

Greenspan v Brassler
78 FRD 130 (SD NY, 1978) 17

In Re Commonwealth Oil/Tesoro Petroleum Securities Litigation
484 F Supp 253 (WD Tex, 1979) 17

Lyon v State of Arizona
80 FRD 665 (D Ariz, 1978) 17

Michigan National Leasing Corporation v Cardillo
103 Mich App 427, ____ NW2d ____ (1981) 4

TABLE OF AUTHORITIES (CONT'D)

Case **Page**

Pashek v Arizona Board of Regents
82 FRD 62 (D Ariz, 1979) 17

Sicinski v Reliance Funding Corp.
82 FRD 730 (SD NY, 1978) 17

Statutes

Equal Credit Opportunity Act,
15 USC §1691 ..... 1, 11, 12

Michigan Married Women's Property Act,
MCL 557.1, MSA 26.161; MCL 557.52,
MSA 26.182; and MCL 557.53;
MSA 26.183 ..... 4, 6, 7,
8, 12, 13

QUESTIONS PRESENTED FOR REVIEW

1. Was the District Court correct in granting summary judgment where the undisputed facts show that Petitioner was denied credit solely because she had an outstanding judgment against her personally?

2. Does Petitioner have standing to challenge Respondent's credit policies where she was not a victim of any discrimination based on sex or marital status?

3. Should this case be certified as a class action where Petitioner is not a member of the class she seeks to represent and where she has made numerous late filings?

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND APPENDIX

COUNTERSTATEMENT OF THE CASE

Petitioner brought this case alleging discrimination against women based on sex and marital status by the Michigan National Bank in its credit operations under the Equal Credit Opportunity Act.[1] An understanding of the facts in this case is vital to an informed evaluation of the issues, and because Petitioner has not actually presented this Court with a statement of the relevant facts, Respondent offers this Counterstatement of the case.

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[1] 15 USC §1691.

Petitioner completed an application for a Michigan BankAmericard on April 21, 1976. Upon receipt of this application, employees of Respondent Michigan National Bank requested a credit check on Petitioner from TRW, a credit reporting company. (AP 724-726)[2] The credit report obtained from TRW indicated that there was a judgment for $600 dated April 27, 1972, outstanding against the Petitioner.[3] On the basis of that reported outstanding judgment, Respondent Bank denied Petitioner's request for a credit card.[4]

About the time when the Bank was processing Petitioner's application, Petitioner telephoned the credit analysts at Michigan National Bank to determine the status of her request for a credit card. Upon being told that her application was being denied because of an outstanding judgment against her, Petitioner told the analyst that she had never had a judgment against herself personally and that this judgment was actually against her husband on his own debt.[5] Although it was subsequently determined that the Petitioner's statement was false and that the judgment had been entered in Petitioner's own name, the parties originally acted on the incorrect assumption that the judgment had been entered against Petitioner's husband. Petitioner was

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[2]References preceded by "A" refer to the items in Respondent's Appendix, attached to this Brief in Opposition. References preceded by "AP" refer to the pages in the Appendix filed with the United States Court of Appeals by Petitioner, which Petitioner has requested be certified to this Court.

[3]In footnote 1 of her brief, Petitioner has presented the facts of the lawsuit in which that 1972 judgment was entered. As will be shown, **infra**, only the fact that the judgment was entered is relevant to this case. The facts underlying that judgment have no bearing here.

[4]AP-725, 835, 846, 879.

[5]AP 835.

informed by the credit analyst that if that were the case, Petitioner should contact TRW to have her record cleared, or to file a "rider" with TRW which would be an explanation by her of the judgment. TRW would then update its report to the bank and a card could be issued.[6] Petitioner testified in her deposition that she did contact TRW who informed her that Household Finance Company, who had placed the notice of the judgment with TRW, was the only one who could have that notice of judgment removed.[7] Petitioner claimed that the employee with whom she spoke at TRW did not know what a "rider" was.[8] Petitioner made no attempt to contact Household Finance Company to ask them to remove the judgment from her record. Instead, she called Michigan National Bank again to tell the credit analyst that TRW did not understand the term "rider", and that she could not file one with them. The analyst informed Petitioner that Petitioner would still have to clear her record through TRW, either by filing her explanation with them or by having them delete the judgment from her record, before a card could be issued. The analyst also said that Petitioner's application would be held for one month so that Petitioner could arrange for an updated report from TRW showing that Petitioner's record had been cleared.[9]

Rather than contacting TRW again to file an explanation with them or seeking to contact Household Finance Corporation to remove the judgment from her record, Petitioner filed this lawsuit alleging that the Bank and its employees discriminate against women in their processing

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[6]AP 636, 837.

[7]AP 641.

[8]AP 642-43, 837-38.

[9]AP 642.

of applications for credit cards. Petitioner asserts that the Bank should have independently investigated the basis of the judgment against Petitioner to determine whether it was entered in violation of the Michigan Married Women's Property Act (MWPA).[10] According to Petitioner, that Act should have barred the judgment which was entered against her in the Detroit Common Pleas Court. The MWPA has been interpreted by one panel of the Michigan Court of Appeals to provide that a married woman is only liable for joint debts incurred with her husband to the extent that the proceeds had gone into her "separate estate". ***City Finance Co. v Kloonstra,*** 47 Mich App 276, 209 NW2d 498 (1973); ***Contra, Michigan National Leasing Corp. v Cardillo,*** 103 Mich App 427, ____ NW2d ____ (1981). Petitioner asserts that the Respondent Bank should have investigated the judgment against her to determine whether the property involved did go into her separate estate, before deciding whether to deny her credit based on the fact of that outstanding judgment. If Petitioner is correct, then a prospective creditor may not rely on a facially valid judgment against an applicant, but must conduct its own investigation and substitute its opinion for that of the judge who originally issued the judgment.[11]

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[10]MCL 557.1, MSA 26.161; MCL 557.52, MSA 26.182; and MCL 557.53; MSA 26.183.

[11]Even if Respondent had tried to make such a decision, it is not certain that the judgment against Petitioner would be found to be in violation of the MWPA as Petitioner asserts. Contrary to the holding in ***Kloonstra, supra,*** another panel of the Michigan Court of Appeals recently held that a married woman could be individually liable on an obligation undertaken jointly with her husband. ***Michigan National Leasing Corporation v Cardillo,*** 103 Mich App 427, ____ NW2d ____ (1981). Thus, under ***Cardillo,*** it doesn't matter whether the property went into the woman's separate estate for purposes of determining her liability on a joint debt.

Petitioner has also asserted that even if she was not discriminated against by the bank in its denial of credit to her, the Bank has supposedly discriminated against some unspecified person or persons, and she should be permitted to act as the representative of all those people who have allegedly been discriminated against in their credit applications. Because of this assertion, Petitioner claims to be a representative of the class of all women requesting and having been (allegedly) discriminatorily denied credit by the Michigan National Bank.

The District Court held that the record was devoid of any evidence of discrimination on the part of the Bank or its employees, and that there was no violation of the Married Women's Property Act by the Michigan National Bank because the Bank was entitled to rely upon the facially valid judgment against Petitioner. The District Court, therefore, granted Respondent's Motion for Summary Judgment. (A-1) This decision was unanimously affirmed by the United States Court of Appeals for the Sixth Circuit on November 12, 1980. (A-2) Petitioner had asked to be certified as a representative of the class of all women allegedly discriminatorily denied credit. The District Court and Court of Appeals held that Petitioner was not a member of the class she sought to represent. The Court of Appeals also specifically discussed Petitioner's repeated tardiness in making filings as support for the District Court's denial of Petitioner's request to be certified as a class representative.

SUMMARY OF ARGUMENT

It is undisputed that Petitioner's credit application was denied for the sole reason that there was an unpaid personal judgment outstanding against her. Petitioner has asserted that the Respondent had an obligation to investigate that judgment to determine whether it had been entered in violation of the Michigan Married Women's Property Act. Both the District Court and Court of Appeals held that a creditor has no obligation to look behind a facially valid judgment entered against the applicant individually. The Respondent does not independently investigate judgments against any applicants, male or female, to determine whether the applicant had any defenses that were not raised prior to the judgment being entered. The record is devoid of evidence of any discrimination by Respondent.

Petitioner claims to have standing to challenge Respondent's credit application policies whether or not she herself was a victim of some form of discrimination. This Court has made it clear that there must be a nexus between the injury felt and the allegedly discriminatory act in order for a plaintiff to have standing. If Petitioner seeks the protection of the Michigan Married Women's Property Act, it was up to her to enforce her rights by raising that defense in the proper court. The Respondent did not discriminate against Petitioner by relying on an objective credit report showing an apparently valid judgment against her.

Petitioner cannot represent the class of all women allegedly discriminatorily denied credit for a number of reasons. First, she has shown no discrimination in general by Respondent, and none in particular against herself. Second, she is subject to the defense of the facially valid judgment against her which other members of the class she seeks to represent are not. Finally, she has made at least 15 late court filings showing that she would be an inadequate representative for any class.

ARGUMENT

I. THE COURT OF APPEALS WAS CORRECT IN AFFIRMING THE DISTRICT COURT'S GRANTING OF SUMMARY JUDGMENT WHERE THE UNDISPUTED FACTS SHOW THAT PETITIONER WAS DENIED CREDIT SOLELY BECAUSE SHE HAD AN OUTSTANDING JUDGMENT AGAINST HER PERSONALLY.

Petitioner has raised some 23 issues in her Petition for Writ of Certiorari, all red herrings designed to make this Court think that there is an actual case of discrimination present here. Despite Petitioner's involved discussion of legislative history and general problems for women in obtaining credit, the simple fact which governs this case is the fact that her personal credit report accurately shows a judgment outstanding against her. It must be emphasized that both of the lower courts held that there was not even a hint of discrimination in the Bank's denial of credit to Petitioner, but that the outstanding judgment against Petitioner in her own name was the only reason for that denial. Petitioner has argued that the Bank had an obligation to look behind that judgment to determine whether it violated the Michigan Married Women's Property Act, but both the District Court (A-1) and the Court of Appeals (A-2) held that the Bank had no such obligation. The Petitioner has not alleged or shown any evidence that the Bank or its employees ever investigate judgments against men who apply for credit. It is difficult, therefore, to see exactly how Petitioner can claim that there has been sex discrimination. Apparently Petitioner asserts that Respondent discriminated by not investigating a judgment against her, which she now claims is unenforceable under a "sex-linked" statute, the MWPA. She did not, however, raise the MWPA as a defense to the credit analysts at the

Respondent Bank when applying for credit. Instead she incorrectly told them that the judgment was against her ex-husband and not against her. The credit analysts could have had no idea that the MWPA would have any affect on this case because Petitioner claimed that the judgment was not hers. All the Respondent did was to ask Petitioner to clear her own record with TRW so that Respondent could issue her a credit card. Respondent simply asked for proof of what Petitioner claimed — that the judgment had been incorrectly reported by TRW, and that it was not against Petitioner. In fact this proof was impossible for Petitioner to produce because the judgment was entered against her individually and TRW had accurately reported it.

Even if, however, Respondent's credit analysts had known that the judgment had been entered against Petitioner individually, it was Petitioner's own responsibility to take whatever steps were necessary to clear her record. If she thought the judgment was invalid under the MWPA, the place to challenge it was in the Common Pleas Court of Detroit where it was entered, and not before creditors who are unfamiliar with the facts of the case. Assume, for example, that an applicant has asserted that a judgment against her was invalid because the statute of limitations had run before the case had been filed, and that therefore the Bank should disregard the judgment in evaluating her creditworthiness. The Bank would properly respond that the statute of limitations was a defense to be raised before the Court, but that it was not within the Bank's power to decide that the judgment was unenforceable. Similarly here, the credit analysts do not have the authority or the ability to evaluate an attack based on the MWPA against a four-year-old facially valid judgment.

Thus, as both lower courts held, it was reasonable and legal for the Respondent to ask Petitioner to clear her TRW record of that judgment if it had been improperly reported

by TRW as she claimed. The Bank, as a potential source of credit for Petitioner, certainly had no obligation to clear Petitioner's credit record for her. The cost to the Bank of investigating all judgments against all prospective credit recipients would be unduly burdensome.

Petitioner has asserted in one of her "Questions Presented" that the fact that four other creditors had granted Petitioner credit despite the judgment against her raised a genuine issue of fact as to whether Respondent's treatment of Petitioner's application had discriminated against her on the basis of her sex or marital status. It is well known, however, that not all creditors are willing to accept the same risks from the persons to whom they grant credit and the fact that some creditors provided Petitioner with limited credit does not mean that the Respondent's tighter standards are illegal. The pertinent inquiry is not whether the Respondent has the same standards as other creditors, but whether the Respondent's standards are illegally discriminatory. Nothing in the record provides any evidence whatsoever of such discrimination. Nothing in the record shows that the Respondent did anything that was outside of the normal course of business in requiring the Petitioner to provide proof that the judgment had actually not been entered against her personally as she claimed. Indeed, a bank would be foolish to purchase the services of a company like TRW and then to ignore the report from that company based on the declarations of the person investigated, unsubstantiated by any documents from the court or the creditor holding the judgment.

Therefore, as both the District Court and the Court of Appeals have held, the Bank did not discriminate in asking Petitioner to clear her record with TRW. The sole reason for Petitioner being denied credit was a judgment against her personally, and it was her own obligation to either satisfy the judgment or otherwise have it removed from

her record in order to obtain credit from Respondent. The pending Petition should be denied because this case presents no questions of fact and no issues of law worthy of review by this Court.

II. PETITIONER DOES NOT HAVE STANDING TO CHALLENGE RESPONDENT'S CREDIT POLICIES BECAUSE SHE WAS NOT A VICTIM OF ANY DISCRIMINATION BASED ON SEX OR MARITAL STATUS, BUT RATHER SHE WAS DENIED CREDIT DUE SOLELY TO AN OUTSTANDING JUDGMENT AGAINST HER PERSONALLY.

While Petitioner has been unable to show any discriminatory acts or policies of the Respondent either in general or against her personally, she has asserted that she has standing to challenge Respondent's policies regarding the granting of credit simply by virtue of having applied for a credit card from Respondent. She claims that she would have standing whether or not she was denied credit, and whether or not the decision in her case was justified. (Petition p. 21.) The absurdity of this argument is readily apparent in light of the statements of this Court regarding standing. Quite recently, in ***Gladstone Realtors v Village of Bellwood,*** 441 US 91, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979), this Court reiterated its traditional requirement of a link between the illegal act and the injury suffered by the Plaintiff.

> "The constitutional limits on standing eliminate claims in which the plaintiff has failed to make out a case or controversy between himself and the defendant. **In order to satisfy Art. III, the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.** Otherwise, the exercise of federal jurisdiction 'would be gratuitous and thus

inconsistent with the Art. III limitation.' ***Simon v Eastern Kentucky Welfare Rights Org,*** **supra,** 426 US at 38, 96 S.Ct. at 1924.

"Even when a case falls within these constitutional boundaries, a plaintiff may still lack standing under the prudential principles by which the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim. For example, a litigant normally must assert an injury that is peculiar to himself or to a distinct group of which he is a part, rather than one 'shared in substantially equal measure by all or a large class of citizens.' ***Warth v Seldin,*** **supra,** 422 US at 499, 95 S.Ct. at 2205. He also must assert his own legal interests rather than those of third parties." 99 S.Ct. at 1608. (Emphasis added.)

Clearly, Petitioner's argument that she should be permitted to "cleanse" and "purify" all aspects of the Respondent's credit procedure despite the fact that she was not affected by any illegal acts, is wrong in light of the statement quoted above. The Petitioner has asked that this Court not apply the "prudential limitations" test for standing in social legislation such as the Equal Credit Opportunity Act. What Petitioner has ignored in this request is that, under ***Gladstone,*** she must first meet the test of an "actual or threatened injury **as a result of** the putatively illegal conduct of the defendant", before this Court is able to even consider prudential limitations. Not only has Petitioner failed to show any illegal activity linked to her denial of credit, but she has failed to show any illegal activity at all. Thus, where Petitioner would suggest that "At first blush, the implication of the Act's language may seem radical" (Petition p. 21), Respondent would submit that the interpretation placed on the Equal Credit

Opportunity Act by Petitioner is absurd. In effect, Petitioner argues that absolutely anyone who applies for credit, whether they are male or female, old or young, married or single, Black or White, tall or short, may challenge any aspect of the Respondent's evaluation procedure simply because they did make that application for credit. Nowhere has this Court even suggested such a broad and ridiculous rule, and it is unlikely that Congress would have tried to incorporate such a rule into the ECOA without making its intention clear.

Petitioner has also claimed that she has standing because a "creditor has a duty to train its personnel on sex-linked or marital status-linked state property laws directly or indirectly affecting creditworthiness". (Petition p. 25.) Petitioner claims that when she told the Bank employees that she had been divorced from her husband and that he had supposedly taken the stove and refrigerator which were allegedly purchased with the loan upon which the judgment was based, the Bank employees should have immediately known that the Michigan Married Women's Property Act might come into play to possibly end her obligation on the debt and to make the judgment unenforceable against her. Petitioner asserts that the Bank should be required to obtain a copy of the judgment and to make a legal decision as to whether that judgment was binding on her at the time it was entered and whether it remained so after her divorce decree had been entered.[12] Respondent respectfully submits that it is ridiculous for Petitioner to

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[12]It is not entirely clear from the discussion in her footnote 1 whether Petitioner asserts that the judgment was invalid at the time it was entered or whether it only became unenforceable when her divorce decree was entered. For purposes of the present case the only relevant fact is that a facially valid judgment was entered against Petitioner individually.

expect bank credit employees to make legal evaluations of the validity of judgments by courts. While it is conceivable that the original creditor may have violated the Michigan Married Women's Property Act in attempting to collect on a joint debt, the Bank was entitled to rely on a facially valid judgment against Petitioner individually.

If Petitioner seeks to obtain the protection of the Michigan Married Women's Property Act, it is her own obligation to enforce the provisions which will help her. Creditors who are asked to extend credit to her should not be expected to investigate all judgments against each applicant to determine whether they violated the Michigan Married Women's Property Act, or any other act. The Respondent was willing to listen to Petitioner's explanation of the judgment, and in fact put her application in their "pending" file, awaiting word from TRW or from some other source that the judgment was indeed not entered against Petitioner as she claimed. Petitioner has repeatedly asserted in her Statement of Issues that a "satisfactory explanation" for a derogatory item in a credit report should be considered in evaluating creditworthiness. Lest this Court be misled by these statements into thinking that such a satisfactory explanation was provided in this case, Respondent must point out that Petitioner never made any explanation for the judgment against her, satisfactory or otherwise. Petitioner did inform the credit analyst at Respondent Bank that the judgment was against her ex-husband and not against herself. This, however, was not true. The judgment had been entered against Petitioner individually, and was correctly reported by TRW. Thus, the Respondent did not turn its back upon a legitimate explanation for the judgment, but simply asked for corroboration of Petitioner's explanation. When that corroboration was not forthcoming, as it could not be, Respondent chose to deny Petitioner's application. In short, Respondent did nothing wrong in asking Petitioner

to provide proof of the invalidity of a facially valid judgment. It was not the obligation of the Bank to investigate the facts for Petitioner in order to determine whether she might have had a valid defense to the judgment if she had bothered to appear in court on the day that the judgment was entered.

Petitioner's counsel has asserted that the Respondent's practices were "attitudinally suspect" (Petition p. 26) and "adversely impact on the basis of her sex and marital status" (Petition p. 27), and that Respondent's criteria are "unvalidated [and] disparately impactive" (Petition p. 27). Despite his creativity with the English language, Petitioner's counsel's proofs and logic are as bad as his grammar. He has shown absolutely nothing to indicate any disparate impact, nothing to show that the Bank's employees' attitudes are "suspect", or that there is anything wrong at all with Respondent's credit evaluation system except that it requires more than an applicant's word that she is creditworthy.

Petitioner asserts that she should have been permitted to continue with more discovery so that she could have proved violations by the Respondent in its credit operations. As the court in ***Equal Employment Opportunity Commission v Carter Carburetor,*** 76 FRD 143, 144 (ED Mo, 1979), vacated on other grounds at 557 F2d 43 (1978), said:

> "The Federal Discovery Rules are designed, **inter alia,** to enable a defendant to elicit the basis for a plaintiff's allegation and to prepare his defenses to the charges made. They are not designed to permit a plaintiff to make broad-based allegations, without any basis for a belief in those allegations, and then to invade the defendant's record in an attempt to determine whether or not a cause of action exists."

Despite having taken depositions of four Bank credit employees,[13] and obtaining a sampling of 200 credit applications from Respondent, Petitioner has been unable to show any evidence of any wrong-doing by the Bank or its employees. Even if she had been able to discover some evidence of wrong-doing, however, as discussed above, Petitioner herself would not have standing to assert such charges of wrong-doing because her credit application was denied solely on the basis of her outstanding judgment.

Therefore Petitioner's request for Writ of Certiorari should be denied.

III. THIS CASE SHOULD NOT BE CERTIFIED AS A CLASS ACTION BECAUSE PETITIONER IS NOT A MEMBER OF THE CLASS SHE SEEKS TO REPRESENT AND BECAUSE HER NUMEROUS LATE FILINGS SHOW THAT SHE WOULD NOT MAKE AN ADEQUATE CLASS REPRESENTATIVE.

Petitioner has asserted that the District Court erred in ruling on the class certification issue before a part of her discovery was completed. What Petitioner has not stated, however, is that no matter what facts she had turned up on discovery, she could not have brought herself within the class of injured persons which she desired to represent. As the District Court noted in its opinion denying Petitioner's Motion for Class Certification:

> "In response to the Court's questions at oral argument as to how the Plaintiff is a member of the classes she seeks to represent, the plaintiff's counsel could only state that Plaintiff was a woman who was denied

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[13] AP 720, 791, 849, 865.

> credit, so that she was a member of the class of all women who were denied credit. The Plaintiff has never even indicated, however, what the Defendant's practices and procedures are that discriminate against either women or persons with spouses who have bad credit ratings. The Plaintiff, therefore, has not carried her burden of showing that she is a member of the classes she seeks to represent; and we cannot certify those classes." (A-3)

Petitioner has also alleged that the District Court erred in not going into detail as to the commonality, typicality, and adequacy of representation elements listed in Federal Rule of Civil Procedure 23(a). She ignores, however, the District Court's statement that "it is clear, however, from the Defendant's Statement of Facts that the Plaintiff has a very unique individual claim, and is not a member of any of the classes that she seeks to represent." (A-3) Plainly, the District Court considered Petitioner's claim to be peculiar to herself and insufficient to qualify her as a representative of a class. In so holding, the District Court was in agreement with several recent Federal District and Court of Appeals decisions. The facts in this case are very similar to those in ***Armour v City of Anniston,*** 597 F2d 46 (5th Cir, 1979). In that case, where a Black former nurses' aide had claimed discrimination in her discharge but the evidence showed that she had been fired for cause, she was held to have no nexus to the proposed class of allegedly discriminatorily discharged employees so that she could not represent it. A number of other cases have also held that where the plaintiff is subject to defenses to which other members of the class would not be subject, he or she

is not an adequate representative of that class.[14] The Fifth Circuit also recently held that simply because the plaintiffs were the same race as other employees and applicants that they sought to represent in a racial discrimination action, they were not necessarily adequate representatives for class certification.[15] Thus the simple fact that Petitioner is a woman does not qualify her to represent all women denied credit.

Another major reason why Plaintiff would be an inadequate representative of the class of women discriminatorily denied credit, if indeed any had been, is the fact that her attorney has made at least 15 late filings, including virtually every filing required with the lower courts in the course of this litigation. In fact, his frequent disregard of court deadlines led to his being admonished by the Court of Appeals in its order filed November 12, 1980.[16] The District Courts have frequently held that a plaintiff's failure to adequately prosecute an action is justification for refusal to certify that plaintiff as a class representative.[17]

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[14]***Greenspan v Brassler,*** 78 FRD 130 (SD NY, 1978) — In a class action for securities fraud, the court refused to certify the class because of materiality and reliance questions, because the plaintiffs were subject to defenses that other plaintiffs in the class would not be subject to, and because the named plaintiffs had only very limited personal knowledge of the claims.

Sicinski v Reliance Funding Corp., 82 FRD 730 (SD NY, 1979) — In an action under the Truth in Lending laws, the plaintiff was subject to defenses that other plaintiffs would not be subject to, and was not personally knowledgeable about the case, so class certification was denied.

[15]***Crawford v Western Electric Co.,*** 614 F2d 1300 (5th Cir, 1980).

[16]A-3.

[17]***In Re Commonwealth Oil/Tesoro Petroleum Securities Litigation,*** 484 F Supp 253 (WD Tex, 1979); ***Brown v Milwaukee Spring Co.,*** 82 FRD 103 (ED Wis, 1979); ***Pashek v Arizona Board of Regents,*** 82 FRD 62 (D Ariz, 1979); ***Lyon v State of Arizona,*** 80 FRD 665 (D Ariz, 1978).

In conclusion, because the Petitioner has not shown herself to be a member of the class or classes she seeks to represent, because she is subject to defenses which are not applicable to other members of those classes, and because she has missed virtually every filing date in this litigation, the District Court and Court of Appeals correctly decided that she should not be certified as a representative in a class action. There is no substantial question of fact or issue of law for this Court to evaluate or decide. Therefore, the Petition for a Writ of Certiorari should be denied.

CONCLUSION

For the foregoing reasons, Respondent Michigan National Bank respectfully requests that this Court deny the pending Petition for Writ of Certiorari.

Respectfully submitted,

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Dated: June 24, 1981

RESPONDENT'S APPENDIX

TABLE OF CONTENTS

		Page
A-1	Opinion of District Court Granting Defendant's Motion for Summary Judgment	1a
A-2	Order of Court of Appeals for the Sixth Circuit Affirming Summary Judgment	6a
A-3	Opinion of District Court Denying Motion for Class Certification	8a

No. 80-1900

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RESPONDENT'S APPENDIX

A-1

OPINION OF DISTRICT COURT GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The Plaintiff filed this action "for violations of Title VII of the Consumer Credit Protection Act, popularly known as the Equal Credit Opportunity Act . . ., 15 U.S.C. S 1691, **et seq.** . . in connection with defendant's policies and procedures in extending credit under the Michigan BankAmericard Program." Complaint I-1. The plaintiff alleges that on April 21, 1976, she applied to defendant for a BankAmericard account and that defendant refused to extend plaintiff credit "under such account on the basis of policies and procedures which operated and continued to

operate to discriminate against plaintiff on the basis of her sex and marital status . . . ." We denied defendant's motion for a more definite statement but allowed defendant to propound ten interrogatories to the plaintiff "to obtain a better statement of plaintiff's claim." Order December 29, 1977. The class allegations in plaintiff's complaint also lack specificity and did not indicate "what the defendant's practices and procedures (were) that discriminate against either women or persons with spouses who have bad credit ratings." Accordingly, we denied plaintiff's motion for class certification. Memorandum and Order, June 13, 1978.[1]

Relying upon facts developed through interrogatories and depositions of relevant witnesses, the defendant has now filed a motion for summary judgment. The defendant contends that there is no dispute as to any material fact and that the facts do not show any prohibitive discrimination against the plaintiff. The plaintiff does not appear to dispute the fact that summary judgment is appropriate in this case, contending that if her legal position is accepted she would be entitled to summary judgment on the question of liability. Plaintiff's brief at 42. When pressed at oral argument to tell the court what disputed facts remained for trial, plaintiff's counsel indicated that facts as to the defendant's general, allegedly discriminatory practices remained in dispute. Plaintiff argued that she had a right to go to trial to establish that defendant generally discriminates against women and against divorced individuals.

The plaintiff's amended complaint is as vague as her initial complaint. Basically, she alleges that defendant

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[1] An additional reason for denying certification was plaintiff's failure to allege facts which indicated that she was a member of the class she sought to represent.

refused to extend credit on the basis of policies and procedures that discriminate against women and divorced individuals and that defendant failed to inform her of her rights and administrative remedies under the Consumer Protection Act. Plaintiff relies upon 15 U.S.C. 1691(a) (1976) which provides that:

> It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction —
>
> (1) On the basis of race, color, religion, national origin, sex or marital status, or age . . . .

The facts developed through discovery establish that on April 21, 1976, plaintiff obtained a Michigan BankAmericard application at one of the defendant's branches.[2] The date stamp on this application indicates that it was received by Michigan BankAmericard on May 4, 1976. See Exhibit 1 attached to defendant's brief. Ms. Dilldine, defendant's employee, requested a credit report on plaintiff from TRW, Inc., a credit reporting company. The credit report forwarded to Ms. Dilldine reflected an unpaid judgment against plaintiff obtained by Household Finance Corporation. See Exhibit 2, attached to defendant's brief; plaintiff's brief in opposition to motion for summary judgment at 1. On May 6, 1976, the defendant forwarded to plaintiff a form notification advising that "we are unable to grant your request for a Michigan BankAmericard" because of information contained in a consumer report from TRW, Inc. The form listed the full name and address of TRW, Inc., and also advised the plaintiff of other provisions of the Federal Equal Credit

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[2] As required by 10 of this court's pretrial order, the defendant filed as exhibits all the documents relevant to plaintiff's application for credit.

Opportunity Act. Exhibit 3 attached to defendant's brief. The plaintiff then sent the defendant a letter, in which she explained that the uncollected judgment, which TRW had reported, was against her husband and not her. Exhibit 4 attached to defendant's brief. There were also a series of telephone calls between the plaintiff and Ms. Dilldine. In one of those calls, Ms. Dilldine advised the plaintiff that she would need some verification from TRW, Inc. that the judgment was indeed against her husband and not her. Ms. Dilldine then wrote on the defendant's copy of the rejection notice that the customer was going to have TRW, Inc., contact the defendant. Exhibit 3 attached to defendant's brief. The plaintiff called TRW, Inc. and was told that Household Finance Corporation, who reported the adverse judgment to TRW, Inc., would have to remove it. **See** Denard deposition at 14. The plaintiff then called Ms. Dilldine, but was told that she had to obtain a "rider" before she could receive credit. **Id.** at 16. The plaintiff did nothing further.

The above facts are uncontroverted. The plaintiff contends that the defendant had a duty to further investigate the plaintiff's adverse credit report, but does not contend that any failure to investigate further was a result of discriminatory motives. **See** plaintiff's brief at 2. The plaintiff also contends that she can show the defendant generally discriminates against women and divorced individuals. Finally, the plaintiff heavily relies upon the defendant's failure to take into account the Michigan Married Women's Property Act, arguing that the plaintiff was indeed not liable on the reported judgment.

If everything the plaintiff contends in her response to defendant's motion for summary judgment is accepted as true, the defendant is still entitled to judgment. The plaintiff simply has not alleged or presented facts that would

indicate any discriminatory conduct in the handling of plaintiff's transaction. Even if the plaintiff can show some general discrimination on the part of the defendant, that does not establish that defendant's refusal to extend this plaintiff credit was discriminatorily motivated. The exhibits and plaintiff's own deposition clearly indicate that credit was denied on the basis of an adverse credit report of an unpaid judgment against the plaintiff personally. The mere establishment of general discrimination is not sufficient to counter those facts. Additionally, defendant does not have an affirmative duty to investigate the circumstances of the reported judgment, so long as the failure to investigate was not based upon discriminatory motives. There is absolutely nothing in this record that would even suggest that the defendant's failure to investigate further was the result of any discriminatory intent or was applied to discriminate. Finally, plaintiff's contentions about the Michigan Married Women's Property Act are irrelevant because the defendant did not know that the judgment was against plaintiff's husband. The plaintiff admits that the reason she was denied credit was because of the report of an adverse judgment against **her.** Moreover, we think it was reasonable for the defendant to require that the plaintiff produce some proof that the uncollected judgment was not against her, in addition to her mere assertion that it was not. Nothing in this record even suggests discrimination in this denial of credit. Therefore, the defendant's motion for summary judgment will be granted.

IT IS SO ORDERED.

/s/ Robert E. DeMascio
United States District Judge

Dated: January 10, 1979

A-2

ORDER OF COURT OF APPEALS FOR THE SIXTH CIRCUIT AFFIRMING SUMMARY JUDGMENT

Plaintiff appeals from the grant of a summary judgment in favor of defendant and the denial of class action certification. This action, brought under the Equal Credit Opportunity Act (E.C.O.A.), 15 U.S.C. §§ 1691 **et seq.**, alleges that the defendant discriminates against women and single persons in its credit practices. Defendant (Bank) has moved for either dismissal of this appeal or summary affirmance on grounds that plaintiff has repeatedly disregarded the trial and appellate court time limits.

Plaintiff, a registered nurse living in Detroit, was divorced in 1975. In April, 1976, she applied for a Michigan Bankcard. Her application was screened and eventually denied because her credit report indicated a 4-year-old judgment against her for $500. Plaintiff was named as sole defendant in the uncollected judgment.

The Bank notified plaintiff that her application had been denied because of the credit report. She contacted the defendant and stated that she was not liable on the indebtedness because of the Michigan Married Woman's Property Act (M.W.P.A.), and that she had good credit references. The defendant told plaintiff that she would have to verify that the judgment was in fact not against her before a credit card would be issued. Plaintiff did not do this, but instead instituted this suit.

The undisputed facts are that the plaintiff had an outstanding judgment against her personally. Plaintiff argues, in effect, that the E.C.O.A. provides not only an opportunity for a defendant-debtor to collaterally attack a

judgment of indebtedness, but that it also imposes an affirmative obligation on a defendant bank to explore any judgment against a woman to be certain that the judgment does not violate the M.W.P.A. We cannot accept such a broad, sweeping contention. At a minimum a bank does not violate the E.C.O.A. when it denies credit to an individual based upon a judgment of indebtedness against that person as the sole defendant. At least in this circumstance the bank is not required to affirmatively investigate such a facially valid judgment.

Plaintiff further urges, however, that if defendant discriminates as to "any aspect" of its credit application it is liable under the E.C.O.A. In effect, the bank would be strictly liable to plaintiff for violating the E.C.O.A. even though the violation was not the reason for denying her credit. Nothing in the language of the E.C.O.A., however, eliminates the requirement of a causal relationship between the discrimination and the effect. Even assuming that the bank violated the E.C.O.A. in some aspects of its credit process, those violations did not affect plaintiff. As noted above, in plaintiff's case the E.C.O.A. does not require an independent investigation by the bank. It is apparent the plaintiff was denied credit for one reason, and one reason only — she had an outstanding judgment against her personally.

We admonish plaintiff's attorney for his frequent disregard of court filing dates. Particularly in light of the frequent late filing by plaintiff, we cannot say that the District Court erred in denying class action certification.

This case is decided on the merits without consideration of defendant's motion to dismiss.

Accordingly, the judgment of the District Court is hereby affirmed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman, Clerk

Issued as Mandate: February 23, 1981

A-3

OPINION OF DISTRICT COURT DENYING MOTION FOR CLASS CERTIFICATION

The plaintiff filed a motion to certify this cause as a class action, contending that she is qualified to represent three distinct classes of individuals who have been denied credit by the defendant. The plaintiff defines those classes as: (1) all who have applied for credit with the defendant who have not been given a notice of their rights under the Consumer Credit Protection Act; (2) all women who have been discriminatorily denied credit by the defendant; and (3) all individuals who have been refused credit on the basis of information about a spouse or former spouse. The plaintiff contends that the four requirements of Fed. R. Civ. P. 23(a) are "more than likely satisfied." The defendant opposes plaintiff's motion arguing that the plaintiff is not a member of any of the classes she seeks to represent, that this action would be totally unmanageable as a class action, that the claims of the named plaintiff are not typical of the class, that the plaintiff would not adequately represent the class, and that the motion to certify is untimely. We agree with the defendant and decline to certify this action as a class action.

The plaintiff filed her complaint on June 2, 1977, at which time she indicated that she was seeking to bring a class action. On January 10, 1978, after this action had been pending for seven months, the court entered an order giving plaintiff an additional 60 days to move to certify the classes she was seeking to represent. The plaintiff did not file her motion to certify until April 3, 1978, 83 days after our January 10th order. The plaintiff has not given any legitimate reason for failing to move within the time limits set by the court or to file a motion for an extension

of time. We believe that the plaintiff's attorney's failure to comply with the time requirements indicate that he might well not be able to fairly and adequately protect the interests of the proposed class in this complex and extended litigation. See *Walker v. Columbia University,* 62 F.R.D. 63, 64 (S.D.N.Y. 1973). Consequently, we will not certify the class, since the plaintiff's motion was not timely. See *Walton v. Eaton Corp.* 563 F. 2d 66, 74-75 (3d Cr. 1977); *Coffin v. Secretary of Health, Education and Welfare,* 400 F. Supp. 953, 956-57 (D.D.C. 1975) **appeal dismissed** 430 U.S. 924.

In any event, we do not choose to base our holding on plaintiff's untimeliness because we conclude that plaintiff's motion to certify must be denied on the merits. The plaintiff bears the burden of establishing that the requirements of Fed. R. Civ. P. 23(a) are met before an action can be certified as a class action. *Senter v. General Motors Corp.,* 532 F.2d 511, 522 (6th Cir. 1976) **cert. denied** 429 U.S. 870. This plaintiff has not, however, even established that she is a member of the class she seeks to represent.

In its response to the instant motion, the defendant has presented an extensive statement of facts, essentially taken from the plaintiff's deposition, that go well beyond the very conclusery allegations of the plaintiff's amended complaint. The defendant indicates that it received a credit report from a company known as TRW that indicated that the plaintiff had not paid an outstanding judgment to Household Finance Corporation. That report did not indicate, in any way, that the judgment was the responsibility of the plaintiff's ex-husband. Therefore, the defendant denied the plaintiff a credit card. The plaintiff then called the defendant to inform them that the judgment was the sole responsibility of her ex-husband, and the defendant

told her that they would need verification from TRW that the uncollected judgment in fact had nothing to do with her. The plaintiff said that she called TRW, who told her that they could not change their report unless the creditor, Household Finance, reported that the judgment was not against her. The plaintiff then called the defendant again, and that was her last contact with them before she initiated this lawsuit. She did not even take the time to obtain a certified copy of the judgment to establish to TRW's satisfaction that she was not named in the judgment. By doing so, she could have also established that she was at least a member of the broad class she identified.

The plaintiff did not, either in her original brief or in her reply brief, challenge the statement of facts the defendant recited or give a counter statement of fact of her own. It is clear, however, from the defendant's statement of fact that the plaintiff has a very unique, individual claim, and is not a member of any of the classes that she seeks to represent. In response to the court's questions at oral argument as to how the plaintiff is a member of the classes she seeks to represent, the plaintiff's counsel could only state that the plaintiff was a woman who was denied credit, so that she was a member of the class of all women who were denied credit. The plaintiff has never even indicated, however, what the defendant's practices and procedures are that discriminate against either women or persons with spouses who have had credit ratings. The plaintiff, therefore, has not carried her burden of showing that she is a member of the classes she seeks to represent; and we cannot certify those classes.

NOW, THEREFORE, IT IS ORDERED that the plaintiff's motion for class certification be, and the same hereby is DENIED.

/s/ Robert E. DeMascio
United States District Judge

Dated: June 13, 1978